Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-364

In The

Supreme Court of the United States

October Term, 1989

PACIFIC POWER AND LIGHT COMPANY, et al.,

Petitioners,

v.

THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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September 29, 1989

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38 pp

QUESTIONS PRESENTED

1. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, a 500 kv transmission line system, which was designed and is operated to transmit private power on a bulk power basis, while recognizing the lower voltage transmission lines are not used for a similar purpose?

2. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, while recognizing that electric cooperatives do not use the same facilities?

3. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, and may it impose similar beneficial use taxes upon users of state owned tax exempt property?

4. May the State of Montana impose beneficial use taxes upon the Colstrip owners for their use of the Montana Intertie, recognizing (1) that the Colstrip owners have reserved the use of the Montana Intertie for a period of at least 21 years pursuant to a firm transmission contract; (2) that the Colstrip owners specifically transmit Colstrip power over the Montana Intertie for a dominant commercial purpose; and (3) that the Colstrip owners have contractually assumed the "impact aid" payments under the terms of the Montana Intertie Agreement?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Respondents, the Department of Revenue of the State of Montana, seven Montana counties, their respective Treasurers, and the Montana State Superintendent of Public Instruction, respectfully request that this Court deny the Petition for a writ of certiorari to the Montana Supreme Court to review its decision in *Pacific Power and Light Company, et al. v. Department of Revenue*, ___ Mont. ___, 773 P.2d 1176 (1989).

OPINIONS BELOW

This case represents the first beneficial use tax case tried before the Honorable Henry Loble, District Judge for the First Judicial District, Lewis and Clark County, Montana. Petitioners' Appendix 13a. The decision of the District Court was affirmed by the Montana Supreme Court on April 17, 1989. Petitioners' Appendix 35a. The Petitioners herein (Colstrip owners) petitioned the Montana Supreme Court for rehearing. The Petition for Rehearing was denied on June 1, 1989.[1]

STATEMENT OF THE CASE

A. The Facts

The essential facts have long been disputed by the parties. The factual controversy was entirely resolved against the Colstrip owners by the Montana Supreme Court. The continuing effort of the Colstrip owners to relitigate the facts, is a

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[1] The Petition for rehearing by the Colstrip owners was partially withdrawn by letter to the Montana Supreme Court dated June 1, 1989. The Colstrip owners recognized that their contention concerning amortization of the cost of the Montana Intertie, through payment of the Montana Intertie charge, had been erroneous for 4½ years.

sufficient reason for denying the writ. *General Talking Pictures v. Western Electric Co.*, 304 U.S. 175 (1938).[2]

The essential facts concerning development of the 500 kv transmission line system from Townsend, Montana to the Garrison Substation (the Montana Intertie), are set forth in the *Pacific* Opinion. During the early 1970's, the Colstrip owners planned the development of Colstrip Units 3 and 4. Each unit produces 700 megawatts of net power. That additional power could not be reliably transmitted over the Montana Power Company and the Bonneville Power Administration (BPA) existing 230 kv transmission line systems. Accordingly, the 500 kv transmission line system, including the Montana Intertie, was engineered, developed and constructed. BPA stated in its final Environmental Impact Statement entitled "Garrison – Spokane 500-kV Transmission Project" dated March 1983:

> In 1971, the Montana Power Company (MPC) agreed with Puget Sound Power and Light Company, Portland General Electric, the Washington Water Power Company, and Pacific Power and Light to submit a proposal to the State of Montana to build two 700-MW coal-fired generating units to supplement the two smaller MPC units at Colstrip, Montana. Coal would be supplied by the MPC-owned Rosebud coal mine in Colstrip. Of the total power generated by Units 1-4, about 1310 MW were to be conveyed approximately 430 miles west on two new parallel 500-kV lines from Colstrip to the Bonneville Power Administration (BPA) system at BPA's Hot Springs Substation in western Montana. There the output could be integrated into Bonneville Power Administration's Federal Columbia

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[2] The Colstrip owners raised a factual challenge in their complaint in *Pacific Power & Light Co. v. Department of Revenue*, No. 50978. Count Seven of the Complaint alleged that they did not use the Montana Intertie within the meaning of Mont. Code Ann. § 15-24-1203 (1983). (Resp. App. 1). The Montana Supreme Court specifically held against them on that factual issue. *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176, 1180 (1989).

River Transmission System. (Def. Ex. 36, Vol. I, Pg. I-2).

Long before the Montana Intertie was energized during October 1983, the Colstrip owners were planning for the efficient transmission of Colstrip power across Montana. The process involved several divisible steps. According to Montana Power Company's (MPC) witness, Mr. Brush, MPC had difficulty securing the right-of-way for the 500 kv lines across Montana. (Brush Tr. Pg. 238).[3] Recognizing that the 500 kv system was a condition precedent to successful operation of Colstrip Units 3 and 4, the Colstrip owners requested that BPA complete a portion of the 500 kv system in Montana.[4]

The 500 kv system across Montana was completed in three segments. The Colstrip owners designed and constructed the segment of the 500 kv system from the Colstrip generating facilities in Rosebud County, Montana, to a point near Townsend, Montana. They own, operate and transmit power across that portion of the system pursuant to the terms of the Colstrip Project Transmission Agreement.[5] That segment of the system was first energized during March 1983. Second, BPA was responsible for construction of the 500 kv system from Townsend to the Garrison Substation. In order to provide for the use of the Montana Intertie, the Colstrip owners and BPA

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[3] Mr. Brush was MPC's electrical engineering witness. He is intimately familiar with the Montana 500 kv transmission line system since he is employed at MPC's control center in Butte, Montana.

[4] The Chief Executive Officer of the Montana Power Company wrote to the Administrator of BPA on September 26, 1977 to formally request that the 500 kv transmission line system be completed to the Hot Springs Substation. (Def. Ex. 44).

[5] The Colstrip project transmission agreement is a contract between the five Colstrip owners providing for ownership and operation of the 500 kv system from Colstrip to Townsend.

entered into an agreement referred to as the Montana Intertie Agreement.[6]

The Montana Intertie secures a valuable use interest to the Colstrip owners. From October 1983 through January 23,

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[6] Transmission Agreement executed by the United States of America, Department of Energy, acting by and through the Bonneville Power Administration and Montana Intertie users (Colstrip project).

> WHEREAS the companies collectively own the output of Units 3 and 4 of the Colstrip Thermal Generating Plant; and
>
> WHEREAS Puget and Montana collectively own the output of Units 1 and 2 of the Colstrip Thermal Generating Plant; and
>
> WHEREAS Bonneville and the Companies except Basin Electric plan to execute firm transmission agreements . . . (referred to herein as the Colstrip Transmission Agreements) to transmit their shares of Colstrip power over the Federal Transmission System to points of delivery specified in the Colstrip Transmission Agreements; and
>
> . . .
>
> WHEREAS Bonneville and the Companies have agreed to build a regional transmission intertie (Montana Intertie) between the Companies' Broadview Substation (Broadview) and a new substation (Garrison) in the vicinity of Deer Lodge, Montana; such Garrison Substation will join the Montana Intertie to the existing Federal Transmission System; and
>
> WHEREAS Bonneville plans to construct the section of the Montana Intertie between Garrison and a point near Townsend, Montana (Townsend) and recover the cost thereof as separately identified portion of the Federal Transmission System, and the Companies plan to construct the section of the Montana Intertie between Townsend and Broadview pursuant to an agreement among the Companies (Colstrip Project Transmission Agreement); and . . . (Pl. Ex. 7).

1986, the only use of the Montana Intertie was for the transmission of Colstrip power.[7] The Montana Intertie Agreement provides for firm transmission rights in favor of the Colstrip owners. Firm transmission means that the transmission of Colstrip power is continuous and that it may not be interrupted.[8] No entities other than the Colstrip owners have firm contracts regarding use of the Montana Intertie. The Colstrip owners pay an Intertie charge to BPA on a monthly basis for the use of the Intertie. It includes BPA's costs of labor, operation, maintenance, its costs of money, and the repayment of the impact aid payments made to Montana Counties.[9] In exchange for the Intertie charge, the Colstrip owners have the unfettered right to use 90% of the east-west capacity of the Montana Intertie for a period of at least 21 years. (Pl. Ex. 7, Ex. D).

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[7] Pursuant to an agreement between Western Area Power Administration and BPA, the Federal Government deferred any use of the Montana Intertie in favor of the Colstrip owners. BPA recognized the limited transmission capacity west of the Garrison Substation, until the Garrison to Taft 500 kv system was completed. (Pl. Ex. 11).

[8] Colstrip power is referred to as Project Scheduled Power under the Montana Intertie Agreement. (Pl. Ex. 7, Pg. 4).

[9] The Intertie charge is set forth in Exhibit E to the Intertie Agreement. It provides that the Colstrip owners have contractually agreed to repay any monies Bonneville might expend under Public Law 96-501. Impact aid payments were authorized by virtue of 16 U.S.C. § 839e(m).

Transmission Demands	Share of Project Output			East to West Transmission Demand	West to East Transmission Demand
	Units 1 & 2	Unit 3	Unit 4		
MPC	330,000 kw	210,000 kw	210,000 kw	420,000 kw	0 kw
Puget	330,000 kw	175,000 kw	175,000 kw	680,000 kw	0 kw
PGE		140,000 kw	140,000 kw	280,000 kw	0 kw
Pacific		70,000 kw	70,000 kw	140,000 kw	0 kw
WWP		105,000 kw	105,000 kw	210,000 kw	0 kw
Total	660,000 kw	700,000 kw	700,000 kw	1,730,000 kw	0 kw
Bonneville				185,000 kw[10]	0 kw
				1,915,000 kw	

[10] BPA expressly agreed to forebear exercising its 185,000 kilowatt reservation on an east to west basis until the 500 kv transmission line system was completed from Garrison to Taft. (Pl. Ex. 7).

The foregoing transmission demands are specifically complementary to the percentage of Colstrip generation which each Colstrip owner owns.

Colstrip Owner	Amount of Generation (Colstrip Units 1, 2, 3 and 4)
Montana	720
Puget	650
PGE	280
Pacific	140
WWP	210
Total	2,000 mw

(Def. Exs. 63-67)

All of the commercial power flow across the Intertie has been in favor of the Colstrip owners. Mr. Ross of BPA testified that prior to the completion of the Garrison to Taft 500 kv system there was no non-firm transmission across the Intertie. (Ross Tr. Pg. 385).[11]

The interests of the Colstrip owners are so substantial, that their interests are akin to a leasehold interest. (Hammerquist Depo. Pgs. 82-83). The Colstrip owners are required to pay for the use of the Intertie, pursuant to the Intertie charge, even if no Colstrip power is flowing across the 500 kv system. In the event that the Colstrip owners elect to build their own 500 kv system, BPA may charge them for the unamortized cost of the Intertie. (Pl. Ex. 7, Cl. 11).

All of the engineering expert testimony supports the conclusion that the Colstrip owners use the Montana Intertie. Professor G. Thomas Heydt testified on behalf of the Respondents as an expert witness.[12] He testified that the Colstrip

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[11] The Colstrip owners' assertion in their Petition at footnote 13 is patently false. The only power flow has been from Colstrip to the West. (Brush Tr. Pgs. 265-266).

[12] Professor Heydt is a Professor of Electrical Engineering at Purdue University. He specializes in power transmission systems.

owners use the 500 kv system from Townsend to Garrison to transmit their Colstrip power. He also testified that they control the flow of power across the 500 kv system by adjusting the steam generation at the Colstrip plants. Mr. Brush testified that most of the Colstrip power flows across the 500 kv system. He had that knowledge as a result of power flow studies which he had conducted. (Brush Tr. Pg. 268). Without the use of the Montana Intertie, Colstrip Units 3 and 4 could not be operated at their rated capacities. (Brush Tr. Pg. 240).

Colstrip Unit 3 could not be energized and operated until the Montana Intertie was completed to Garrison. Mr. Gregg of the Montana Power Company confirmed that fact.

> This letter is in response to the Administration's request for a current status report of the need for the Townsend-Garrison 500-kV transmission line and substation facilities. . . .
>
> If the 500-kV lines from Colstrip to Townsend to Garrison and the Garrison Substation are not completed by the fall of 1983 as presently scheduled, it would not be feasible to place Colstrip Unit No. 3 in commercial operation. However, with the interconnection of the proposed 500-kV lines at Garrison, substantially all of the plant capacity for Colstrip Unit No. 3 can be utilized. (Def. Ex. 45).

B. The Proceedings in State District Court.

During 1984, the Department notified the Colstrip owners that beneficial use taxes were being imposed for their use of the Montana Intertie pursuant to Mont. Code Ann. § 15-24-1203 (1983).[13] The Colstrip owners filed suit in the First Judicial District Court in Helena, Montana. After a four day trial, the District Court sustained the imposition of beneficial use taxes upon them. During trial, the Colstrip owners did not produce any power sales contracts between BPA and Montana cooperative customers, nor did they call any witness

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[13] The beneficial use tax statute, Mont. Code Ann. § 15-24-1203, was amended by Chapter 683 of the Laws of Montana 1983.

from a Montana cooperative who was knowledgeable about its operations and its relationship to the 500 kv system in Montana.

C. The Montana Supreme Court Decision.

The Colstrip owners' constitutional challenge to beneficial use taxation was rejected by the Montana Supreme Court on April 17, 1989. Their petition for re-hearing was denied on June 1, 1989.[14]

REASONS WHY THE WRIT SHOULD BE DENIED

The Colstrip owners, as the beneficial users of the Montana Intertie, should pay their fair share of state taxation.

> . . . the Court consistently has indicated that 'interstate commerce may be made to pay its way,' and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.

Complete Auto Transit v. Brady, 430 U.S. 274, 281 (1977).

The Montana beneficial use tax statute fulfills each of the criterion set forth in *Brady*. There is no discrimination against interstate commerce. Montana beneficial use taxes are imposed upon the Montana Power Company and Pacific, the intrastate users of the Intertie, in precisely the same fashion that taxes are imposed upon out-of-state utilities. The tax is predicated upon the amount of reserved capacity in the Montana Intertie in favor of each Colstrip owner. The tax is not dependent upon " . . . any distinction between in-state and out-of-state consumers." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981).

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[14] The Colstrip owners asserted in their petition for a re-hearing that the Montana Court had improperly concluded that they were responsible for fully amortizing the cost of the Montana Intertie. *Pacific*, at 773 P.2d 1181. The Colstrip owners admitted that their argument on this point was erroneous by letter to the Montana Court dated June 1, 1989. The Colstrip owners continuously misconstrued their own contractual relationship with BPA for 4½ years. (Whittinghill Tr. Pg. 1081).

The purpose of the tax is not in doubt. 500 kv systems owned by private parties in Montana are subject to taxation. Mont. Code Ann. § 15-23-101 (1983). Before the amendment to Mont. Code Ann. § 15-24-1203, beneficial users of the Montana Intertie, such as the Colstrip owners, would have escaped all state taxation. The Montana Supreme Court deemed such a result to be a "tax windfall." *Pacific*, at 773 P.2d 1183. The Montana beneficial use tax statute is an equivalency statute, which is applicable in those instances where Federal property is used for private commercial purposes. *United States v. Boyd*, 378 U.S. 39 (1964).

The Colstrip owners may not escape beneficial use taxation under the auspices of the Supremacy Clause. Congress did not intend for impact aid payments, pursuant to 16 U.S.C. § 839e(m), to be substitutes for state taxation. BPA did not implement the provisions of the law in a manner which was intended to be in lieu of state taxation. The Colstrip owners have contractually assumed all impact aid payments pursuant to the terms of the Montana Intertie Agreement.

15 U.S.C. § 391 is, by its very language, inapplicable to Montana beneficial use taxation. There is no discrimination against out-of-state consumers or producers of electricity. The taxes imposed on intrastate users of the Intertie and interstate users of the Intertie are predicated upon the reserved transmission demands under the Montana Intertie Agreement. Federal law is not in conflict with state law. *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707 (1985).

The Colstrip owners do not "actually 'stand in the Government's shoes.' " *United States v. New Mexico*, 455 U.S. 720, 736 (1982). The legal and economic incidents of the beneficial use taxes do not fall upon the United States. *United States v. County of Fresno*, 429 U.S. 452 (1977). BPA has a completely neutral attitude about the imposition of beneficial use taxes upon the Colstrip owners.[15] Neither BPA nor the

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[15] Mr. Eskridge, BPA Montana District Manager, testified that Bonneville is neutral about the imposition of beneficial use taxes. (Eskridge Tr. Pg. 577).

United States have intervened in the litigation, although the litigation was well known to the United States for a period of 5 years. Beneficial use taxation of private users of Federal property "returns to the original intent of *M'Culloch v. Maryland.*" *United States v. County of Fresno*, 429 U.S. 452, 463 (1977).

The nexus between transmission of 1,915 megawatts of Colstrip power 92 miles across the Montana Intertie on a continuous basis, and the State of Montana, is substantial. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954). The Due Process clause is fully satisfied. The Montana Legislature drew a rational distinction between users of 500 kv transmission line systems and cooperative customers of BPA. Such legislative tax classifications are constitutionally sound. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

> The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable.

Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, ___ U.S. ___, 109 S.Ct. 633, 638 (1988).

A. The Commerce Clause: The imposition of Montana's beneficial use tax upon the Colstrip owners for their use of the Montana Intertie does not discriminate against interstate commerce.

The Colstrip owners raise an argument which is remarkably similar to the argument which this Court rejected in *Commonwealth Edison Co. v. Montana*, supra.

> Instead, the gravamen of appellants' claim is that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers. Appellants do not suggest that this assertion is based on any of this Court's prior discriminatory tax cases.

Id., 453 U.S. 609, 618.

Montana's beneficial use tax statute is applied in an even-handed fashion. Montana Power Company has reserved 24% of the east to west capacity in the Montana Intertie. Its beneficial use taxes are predicated upon that 24% reserved capacity. Montana consumers and rate payers will accordingly assume 24% of the beneficial use taxes through the years. Similarly, Pacific has a portion of its service territory in Montana. It reserved 7% of the east to west capacity in the Intertie, and accordingly will pay 7% of the beneficial use taxes as a result of its use. Those taxes presumably will be passed on to its Montana consumers and customers.[16] Just as in *Commonwealth Edison*, the amount of tax is directly dependent upon the specific interest which is being taxed. In that case, the severance tax was based upon the amount of coal taken. In this case, the tax is based upon a user's reserved capacity in the 500 kv system.

The Colstrip owners' contentions regarding exportation of beneficial use taxes to out-of-state citizens, is without foundation. Investor-owned utilities routinely pass on the cost of taxes to their consumers, through ratemaking procedures. *Appalachian Power Co. v. Federal Power Commission*, 382 F.2d 237 (4th Cir. 1964), cert. denied 379 U.S. 829 (1964). Thus, it is of no moment that Puget passes on all of its Montana ad valorem taxes to its Washington ratepayers and customers. Mont. Code Ann. § 15-23-101 (1983). If investor-owned utilities could avoid state taxation by merely asserting that a disproportionate amount of the taxes would ultimately be passed on to out-of-state consumers, state tax systems would be irretrievably frustrated.

The sponsor of the amendment to Mont. Code Ann. § 15-24-1203 recognized the practical effect of imposing beneficial use taxes upon users of 500 kv lines.[17]

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[16] Pacific's Report to the Federal Energy Regulatory Commission reflects that a portion of its service territory is in Montana. (Def. Ex. 73).

[17] "Representative Marks said he cannot see where the rate payers will be assessed an additional charge any more than they would have, had

(Continued on following page)

The selection of the use of 500 kv transmission line systems for beneficial use taxation is related to a rational purpose. 500 kv systems, which are owned by investor owned utilities, are subject to ad valorem property taxation in Montana. Mont. Code Ann. § 15-23-101 (1983). (Resp. App. 2). The Colstrip owners pay ad valorem property taxes for the 500 kv system which they own in Montana. But for the amendment to Mont. Code Ann. § 15-24-1203, MCA, during 1983, they would not have paid any taxes despite the reservation of the Montana Intertie for their benefit. In order to close this "tax loop hole", the Montana Legislature enacted the amendment to the statute.[18] This tax equivalency purpose is constitutionally rooted. *D.H. Holmes Co. v. McNamara*, ___ U.S. ___, 108 S.Ct. 1619 (1988).

Despite the Colstrip owners abject failure to prove that the cooperative customers of BPA in Montana are similarly situated, they persist with that argument. They failed to prove that the cooperative customers of BPA use the Montana Intertie.

> In regard to Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

Pacific, at 773 P.2d 1188.

(Continued from previous page)

that line been built by a private partnership. If it had been built by a private partnership, as was originally planned, the property tax would have been in place and the rate payers would have ultimately picked up that charge." (Minutes of the House Taxation Committee, Pg. 4, March 1, 1983).

[18] Representative Marks stated the purpose of the amendment.

> House Bill 747 would impose the privilege tax. It is unfair for government owned power companies to come in and compete with privately owned power companies. If the power line would have been privately owned, the counties would have received taxes off that line. (Minutes of the House Taxation Committee, Pg. 1, March 1, 1983).

Certiorari does not lie to review factual issues which have been determined by the Court below. *Southern Power Co. v. North Carolina Public Service Commission*, 263 U.S. 508 (1924).

The Montana Legislature properly recognized that cooperative customers of BPA are vastly different than investor owned utilities. Cooperatives, by law, must provide federal power to their customers without a profit making animus. 16 U.S.C. § 832b. (Resp. App. 8). Montana cooperative customers of BPA purchase federal power at a priority firm rate. 16 U.S.C. § 832c. (Resp. App. 9). *Pacific*, at 773 P.2d 1187. Their priority rights are guaranteed by federal law.[19] The Colstrip owners generate and transmit vast amounts of Colstrip power across Montana for retail sale at a profit. They are bulk power transferrers of large amounts of privately owned power. (Ross Tr. Pg. 368). Cooperatives do not utilize the Montana Intertie. They are served through wheeling agreements with an investor owned utility such as MPC. *Ottertail Power Co. v. United States*, 410 U.S. 366 (1973).[20] Congress has separately classified cooperatives in the 1980 Regional Act. 16 U.S.C. § 839c(e). (Resp. App. 12). The Montana Intertie is a specifically segmented portion of the Federal Columbia River Transmission System. Its costs are specifically recovered from the users – the Colstrip owners.[21] Cooperative customers were not charged for the use of the Intertie. Cooperative customers did not pay to amortize the cost of the Montana Intertie. BPA built the Montana Intertie specifically

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[19] 16 U.S.C. § 839c(a); 16 U.S.C. § 839g(c) (Resp. App. 11 and 13).

[20] MPC admitted in answers to Interrogatories that it provides wheeling services over its transmission lines for BPA's cooperative customers. (Answer to Interrogatory 128).

[21] BPA's transmission rate design studies reflect that the cost of the Montana Intertie is recovered exclusively from the Colstrip owners. (Def. Ex. 43). See also Pl. Ex. 7, Pg. 3.

for the benefit of the Colstrip owners.[22] The record is absolutely devoid of any proof to establish that cooperatives have reserved any firm transmission capacity in the Montana Intertie for an extended period of time. The Colstrip owners have done precisely that. (Pl. Ex. 7). The Montana Supreme Court's conclusion that cooperatives do not use the Montana Intertie is irrefutable.[23]

Montana's tax classification system is beyond constitutional reproach.

> Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

The foregoing discussion reflects the distinctive nature between investor owned utilities and Montana cooperative customers of BPA.[24] The Montana Supreme Court has long sustained property tax classifications which are based upon a difference in productivity, utility, and economic setting in society. *Department of Revenue v. Montana Stockgrowers Ass'n.*, 777 P.2d 285 (1989). The tax classification statute at issue in that case, is a portion of the same tax classification system of which the Colstrip owners complain.

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[22] Mr. Eskridge testified that the Montana Intertie was not built at the request of cooperative customers. (Eskridge Tr. Pg. 555). He also testified that the cooperative customers could be adequately served before the development of the 500 kv system. (Eskridge Tr. Pg. 555-556).

[23] The Department explicitly stated in its Brief to the Montana Supreme Court "The preference customers of Bonneville Power Administration do not use the Montana Intertie." (Brief to the Supreme Court, Pg. 31, November 10, 1988).

[24] Mont. Code Ann. § 15-6-135 (1987) imposes a tax rate of 3% of market value for cooperative property. It also affords the same tax rate for "new industrial" property. Three of the Colstrip owners enjoyed this preferential tax classification as a result of their development of the Colstrip generating units. *Department of Revenue v. Puget Sound Power & Light Co.*, 587 P.2d 1282 (1978).

The Colstrip owners' discrimination argument collapses under its own weight. They admit that shorter transmission lines and local distribution lines are used for distribution, rather than for bulk power transfers. (Petition Pg. 6). This clear difference in use constitutes a sufficient basis for tax classification under any system. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, supra.[25]

Constitutional adjudication should not be predicated upon expectancies. The Colstrip owners' argument concerning the amendment to Mont. Code Ann. § 15-6-141(1)(a) during 1981 is premature. Congress has not enacted legislation allowing Montana to tax the property owned by an agency to transmit or distribute electrical energy.[26]

The Colstrip owners continuously misstate the record and the issue before the Montana Supreme Court. The Respondents conclusively established that they had applied the beneficial use tax statute to users of state tax exempt property. *Pacific*, at 773 P.2d 1184. The beneficial use taxation of those entities was predicated upon Mont. Code Ann. § 15-24-1203 (1983). That is precisely the same statute upon which beneficial use taxation of the Colstrip owners is predicated. There was no discrimination against those who use federal property, in favor of those who use state property. The decision in *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987) aff'd, 108 S.Ct. 1568 (1988), is not applicable.[27]

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[25] The Colstrip owners' argument is essentially moot. The question before the Montana Supreme Court was not whether the Legislature could separately classify the property of Montana cooperatives (Mont. Code Ann. § 15-6-135 (1983), and the property of investor owned utilities for ad valorem tax purposes. (Mont. Code Ann. § 15-6-141 (1983). The Montana Court was not called upon to decide that issue. The Colstrip owners may not raise it to justify a writ of certiorari. *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

[26] Chapter 478, Laws of Montana 1981.

[27] The Montana Supreme Court held that Mont. Code Ann. § 15-24-1203 (1987), had not been applied in the case, that it had not been considered by the District Court, and that it was inapplicable for purposes of the litigation. *Pacific*, at 773 P.2d 1184. Mont. Code Ann. § 1-2-201 (1983). (Resp. App. 3).

The Colstrip owners argument concerning *Brady's* fair apportionment test is without merit. First, impact aid payments are not a substitute for taxation.[28] BPA, represented to Montana citizens that impact aid would be available in the counties where the 500 kv system was being constructed. It carefully avoided any representation that impact aid would be substituted for state taxation.[29] Second, the Colstrip owners recognized that impact aid payments would not be a substitute for taxation. When they entered into the Montana Intertie Agreement on April 17, 1981, they contractually agreed to reimburse BPA, via the Intertie charge, for any impact aid payments. Third, the Colstrip owners misapprehend the purpose of the fair relationship test set forth in *Brady*.

> Rather, the test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before any tax may be levied on it. . . .since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden'.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625-626.

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[28] Mr. Eskridge, BPA's Montana District Manager, was deposed and his deposition was introduced into evidence. It reflects that BPA never intended that its implementation of its impact aid policy would be substituted for state taxation. (Eskridge Depo. Pgs. 14-15).

[29] "Federal law currently prohibits BPA from making in-lieu tax payments. However, the BPA administrator, under provisions of the Pacific Northwest Electric Power Planning and Conservation Act, may make impact aid payments to local governments to compensate for increased services required because of the transmission project." Final Environmental Impact Statement – Garrison-Spokane 500-kV Transmission Project, March 1983. (Def. Ex. 36, Vol. II, Pg. II-27).

"As a Federal agency, BPA pays no taxes to State or local governments. Congress could authorize in-lieu-of-tax payments, but has not done so. There is a provision in the Regional Act for 'impact aid payments' based on services provided the Administration. These are not in-lieu-of-tax payments but payments for impact on local government services." Id. at Pg. II-89.

The nexus between the use of the Montana Intertie and the State of Montana cannot be doubted. The transmission of vast amounts of Colstrip power over the Intertie is for one purpose only. That purpose is the sale of Colstrip power to the Colstrip owners customers.[30] This commercial enterprise is "an activity or presence" which subjects the Colstrip owners to the taxing power of Montana. *D.H. Holmes Co. v. McNamara*, supra.

The Colstrip owners erroneously assert that impact aid payments are an adequate substitute for beneficial use taxation. The facts reveal otherwise.[31] The 1984 beneficial use taxes, for the use of the Montana Intertie, amount to $1.6 million. The imposition of these beneficial use taxes ensures that interstate commerce will not be placed "in a privileged position." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623.[32]

B. The Supremacy Clause: Montana's beneficial use taxes are not preempted by the impact aid provisions of the 1980 Regional Act, nor are they preempted by 15 U.S.C. § 391. The doctrine of implied preemption is inapplicable.

One who institutes a preemption challenge to a state law, carries a very heavy burden of proof.[33] The Colstrip owners

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[30] The vast commercial enterprise of the generation, transmission and sale of Colstrip power is clearly reflected in the annual reports which the Colstrip owners submit to the Federal Energy Regulatory Commission. (Def. Ex. 68-82).

[31] Mr. Eskridge testified that BPA had made limited one time construction impact aid payments to three Montana counties, where the Montana Intertie is situated, in the amount of $156,055. (Eskridge Tr. Pg. 548).

[32] The Montana Intertie, which was constructed expressly for the benefit of the Colstrip owners, cost approximately $92 million. The benefit of the Montana Intertie will enure to the Colstrip owners for at least 23 years. (Pl. Ex. 7). This "significant economic presence" subjects the Colstrip owners to fairly imposed Montana taxes. *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619, 1624.

[33] See Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Constitutional Commentary 311 (1988).

have consistently failed to prove that Congress intended to preempt Montana beneficial use taxation when it enacted 16 U.S.C. § 839e(m) and when it enacted 15 U.S.C. § 391.

The doctrine of implied preemption is inapplicable under the modern rule stated in *County of Fresno*. Beneficial use taxes fall upon the private users of the Montana Intertie. Neither the economic nor the legal incidence of the tax is passed on to the United States.

1. Impact aid was never intended to preempt beneficial use taxation. 15 U.S.C. § 391 is not applicable to Montana beneficial use taxation.

Congress clearly expressed its purpose in enacting the 1980 Regional Act.[34] The text of the Act makes it clear that Congress did not intend to preempt any form of state taxation.

a. The Impact Aid provisions of the 1980 Regional Act.

16 U.S.C. § 839e(m) is clear on its face. It was not designed to be, it has not been administered as, and it does not serve as a substitute for taxation. In the words of BPA:

> B. Payment of Service Costs. BPA has determined that the 'costs' which can be paid through impact aid can only be service costs, and not any other costs or reimbursement of lost taxes. . . . Any uncertainty on this or the tax issue is put to rest by the legislative history. Representative Dingell, in his summary of section 7(m)(126 Cong. Rec. 10685 (daily ed. Nov. 17, 1980)) stated:
>
> > The intent is to make these payments reflect the services provided by the governments and not any taxes that may have been lost or estimated to have been lost by the communities. This is not a payment-in-lieu-of-taxes provision. (48 Fed.Reg. 55765).

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[34] 16 U.S.C. § 839 sets forth the Congressional declaration of purpose. (Resp. App. 14).

It is clear that Congress will provide for payments in lieu of taxation, when it deems it appropriate to do so.[35] Congress will specifically preempt state taxation when it intends to do so. It did so when it enacted section 9b of the Atomic Energy Act of 1946. *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952).

BPA represented to Montanans that impact aid was not designed to be a substitute for state taxation. Mr. Eskridge stated that impact aid was not a substitute for, or in-lieu-of, state taxation. (Eskridge Tr. Pgs. 532-533, 538-539 and 551)[36]. BPA made it clear, in its Environmental Impact Statement, that impact aid was not a substitute for taxation.[37]

The Colstrip owners recitation of the chronology of events leading to impact aid payments is erroneous. The Regional Act was enacted on December 5, 1980. On April 17, 1981, the Colstrip owners entered into the Montana Intertie Agreement with BPA. (Pl. Ex. 7). They expressly assumed the obligation for all impact aid payments which BPA might subsequently make.[38] The Colstrip owners assertion that

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[35] Congress deemed it appropriate to provide for "payments in lieu of taxes" when it enacted the Atomic Energy Act of 1954. 42 U.S.C. § 2208 (Resp. App. 17).

[36] Mr. Eskridge testified that impact aid payments were not in-lieu-of state taxation during his deposition. (Eskridge Depo. Pg. 14).

[37] "9. Comment: BPA should make payments in-lieu-of-taxes, even if it requires an act of Congress to make these payments legal.

Response: Congress has not given BPA the authority to make payments in-lieu-of-taxes. We cannot make such payments until Congress authorizes them." (Def. Ex. 36, Vol. II, Pg. II-91).

[38] "Total Annual Costs of facilities associated with the Townsend-Garrison 500 kV transmission line including terminals, and, prior to extension of the 500 kV portion of the Federal Transmission System to Garrison, the 500/230 kV transformer at Garrison. Such annual costs are the total of . . . (4) payments made pursuant to section 7(m) of Public Law 96-501 with respect to these facilities." (Pl. Ex. 7, Section E, Pg. 3).

impact aid payments account for *all* economic impacts associated with construction of the 500 kv system is simply erroneous. BPA stated in its notice to adopt its impact aid policy that "[t]he intent is to pay for a qualifying local government's cost of services . . . Services covered are all those reasonably related to the facility . . . and include . . . school services, etc." 48 Fed.Reg. 55764. However, in implementing the Act, Bonneville did not include the cost of providing school services as an element of the impact aid formula. (Eskridge Tr. Pg. 521).

The Colstrip owners misapprehend the purpose of impact aid and the purpose of taxation. "A tax is not an assessment of benefits." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937). Impact aid payments were made to three Montana counties, as a result of the presence of a transitory construction work force. (Eskridge Depo. Pgs. 33-34). The two concepts are mutually exclusive.

> In cases such as this, it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634.

b. 15 U.S.C. § 391 is not applicable.

This Court has held that preemption analysis begins with a presumption that Congress does not intend to displace state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). 15 U.S.C. § 391 is inapplicable for several reasons. First, Congress clearly targeted the law at the New Mexico electrical energy tax. *Arizona Public Service Commission v. Snead*, 441 U.S. 141 (1979). Second, the Montana tax statute contains no discriminatory credits. It applies equally to interstate users of the Montana Intertie and to intrastate users of the Intertie.[39] Third, the Colstrip owners have not proven any discrimination

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[39] *Pacific*, at 773 P.2d 1185.

which would be barred by the statute.[40] The Colstrip owners' Supremacy Clause assertions regarding the statute ultimately collapse into their Commerce Clause argument.

BPA's Environmental Impact Statement makes it clear that the use of the Montana Intertie will benefit both intrastate and interstate Colstrip owners.[41] The Colstrip owners' citation to *State v. Burbank*, 691 P.2d 845 (1984), is particularly perplexing. The Colstrip owners have consistently urged that the Department should impose beneficial use taxes upon the generation from federal hydroelectric plants.[42]

2. Beneficial use taxation of the use of the Montana Intertie is fully justified by this Court's Supremacy Clause cases.

The Colstrip owners lack the fundamental standing to raise an implied preemption argument. They do not "actually

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[40] Pursuant to its Garrison West Agreement with BPA, MPC transmits its Colstrip power only to the Garrison Substation. (Pl. Ex. 8). MPC is fully taxed for its use of the Montana Intertie between Townsend and Garrison. Montana consumers and ratepayers will absorb at least 24% of all beneficial use taxes which are levied upon the use of the Montana Intertie.

[41] "When Units 3 and 4 are completed, the generating capacity will be about 2,100 MW; 860 MW, by contract, will directly serve the needs of Montana residents, while the remaining contracted 1,240 MW will be transmitted to the utility participants to serve customers throughout the Northwest. One-half (65 MW) of Pacific Power and Light's share will be additionally delivered within Montana at Libby and Flathead. Successful integration into Bonneville's system will require reinforcement of part of the Federal system and extension of the main 500-kV electrical grid to the vicinity of Garrison, Montana. Without adding 500-kV transmission facilities to BPA's power grid, the existing transmission system would not be viable for transmitting the output of Unit 4, and would not form a reliable intertie to transmit the scheduled 1,240 MW of energy to Northwest users." (Def. Ex. 36, Vol. I, Pgs. I-10 and I-11).

[42] The Amended Complaint alleges discrimination, since the Department had not imposed beneficial use taxes as a result of power generated at federal hydroelectric dams. (Complaint, Count II, para. 26). This allegation flies in the face of their assertion that 15 U.S.C. § 391 bars a tax upon power generated at the Hoover Dam.

'stand in the Government's shoes.' " *United States v. New Mexico*, supra. They are not instrumentalities of the United States, with respect to the use of the Montana Intertie. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Nor are they agents acting on behalf of the United States. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). The transmission of 1,915 megawatts of Colstrip power on a continuous basis by the Colstrip owners cannot impede or impair the operations of the Government.[43]

Modern Supremacy Clause jurisprudence is predicated upon *County of Fresno*.

> . . . and M'Culloch foresaw the unfairness in forcing a State to exempt private individuals with beneficial interests in federal property from taxes imposed on similar interests held by others in private property.

Id. at 429 U.S. 463.

This Court has clearly stated the foundational predicates for beneficial use taxation.

> Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. . . .His personal advantages from the relationship by way of salary, profit, *or beneficial personal use of the property may be taxed* as we have held.

United States v. County of Allegheny, 322 U.S. 174, 187-188 (1944).

The most modern expression of this rule is found in *County of Fresno*, supra.

> These cases make clear that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and

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[43] BPA deferred its interest in the Intertie in favor of the Colstrip owners. Its 185 megawatt reservation was not exercised, in order that the Colstrip owners would have the full use of the east to west capacity, until the Garrison to Taft 500 kv system was completed. (Pl. Exs. 7 and 11).

> so long as it is the possession *or use by the private citizen that is being taxed.*

Id. at 429 U.S. 462.

The Montana beneficial use tax statute squares precisely with these rules.

> The tax shall be imposed upon the possession *or other beneficial use* of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. (Mont. Code Ann. § 15-24-1203 (1983)).

The Court has recognized that "[t]he privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582.[44] The Court has accordingly sustained use taxes upon a private corporation which leased a federal industrial plant in Michigan. *United States v. City of Detroit*, 355 U.S. 466 (1958). A private enterprise, acting as a permittee, was subject to the Michigan beneficial use tax statute in *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities.

Id. at 355 U.S. 486.

The Michigan personal property tax statute was successfully imposed upon a private contractor doing work on behalf of the United States in *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

> The use by the contractor for his own private ends – in connection with commercial activities carried on for profit – is a separate and distinct taxable activity.

United States v. Boyd, 378 U.S. 39, 44.[45]

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[44] The Montana Intertie Agreement provides for "Payment for Use of Montana Intertie." (Pl. Ex. 7, Pg. 10).

[45] The Montana Supreme Court relied heavily on this Court's decision in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906). *Pacific*, at 773 P.2d 1180.

The right of the Colstrip owners to use the Montana Intertie cannot be doubted. Its substantial interests are set forth in an earlier portion of this Brief. Its rights are far more substantial than the contractual rights, which formed the predicate for taxation in *International Paper Co. v. County of Siskiyou*, 515 F.2d 285 (9th Cir. 1974). Taxation is frequently based upon interests which are less than fully possessory in nature. *Portland General Electric Co. v. State Tax Commission*, 437 P.2d 827 (1968).

The beneficial use taxes upon the Colstrip owners, easily satisfy the test set forth in *County of Fresno*, supra. First, neither the legal nor the economic incidence of the taxes fall upon the United States. The Colstrip owners pay the taxes and they will never be passed on to the United States.[46] Second, the tax is nondiscriminatory for all of the reasons set forth in this Brief. Third, the value of the Colstrip owners' use interest in the lines has been carefully segregated by the Respondents. Pursuant to *United States v. County of Allegheny*, supra, only the interests of the Colstrip owners are subject to taxation.[47]

The Montana beneficial use tax statute is clearly distinguishable from the Tennessee tax statute which was set aside in *United States v. Hawkins County, Tennessee*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 109 S.Ct. 1638 (1989). In *Hawkins County*, the 6th Circuit held that a private contractor,

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[46] The reference to Mr. Hammerquist's testimony is disingenuous. Mr. Hammerquist was an electrical engineer called to testify about a matter of which he had no knowledge. (Hammerquist Tr. Pgs. 454 and 460).

[47] The taxes are predicated upon the cost of the transmission line system ($92,000,000) times the allocated transmission capacities in favor of each Colstrip owner. Thus, for Montana Power Company the tax is predicated upon $92,000,000 times 420,000 kw over 1,730,000 kw. Collectively, $36,000,000 of the cost was utilized as a measure of the beneficial use interests in favor of the Colstrip owners. *United States v. City of Detroit*, supra.

operating under a cost plus contract with the United States "has a beneficial use of the government-owned property." Id. at 859 F.2d 23. The Tennessee statute did not describe a specific beneficial use, which was allocated solely to the private use of the government owned property. The Tennessee statute imposed a general ad valorem property tax on an interest in real property.[48] The Montana Supreme Court held that only the use interest of the Colstrip owners was being recognized for beneficial use taxation purposes.

> The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement.

Pacific, at 773 P.2d 1179.[49]

The Montana beneficial use tax statute recognizes an interest in federal property which is far more substantial than that which was sustained in *County of Fresno*, supra.

> There the property was being used by business for 'profit' and here the property is being put to 'beneficial personal use'. Under the rule of *United States v. Allegheny County* and *United States v. City of Detroit*, this difference is inconsequential. The two types of interests are equally taxable.

Id. at 429 U.S. 467.

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[48] Montana's general ad valorem real property tax statute is Mont. Code Ann. § 15-6-134 (1983). (Resp. App. 4).

[49] The Montana Supreme Court explicitly recognized that the Department had the right to base the taxes upon the full value of the transmission line system, because BPA had not exercised its right to use any portion of the capacity of the line for federal purposes. *Pacific*, at 773 P.2d 1182.

C. The Fourteenth Amendment: Montana's beneficial use tax statute is fully consistent with the guarantees of the Equal Protection and the Due Process clauses.

The Due Process clause imposes a requirement that a tax have a nexus with the state which is imposing it. *Miller Brothers Co. v. Maryland*, supra. Colstrip power is generated in Rosebud County, Montana. It is transmitted 430 miles across Montana, through the vehicle of the 500 kv system.[50] The taxes fairly reflect the Colstrip owners' activities in Montana. *Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317 (1968). The right to transmit 1,915 megawatts of Colstrip power across the Montana Intertie is coextensive with the life of the Colstrip plants in Rosebud County, Montana. The tax is based exclusively upon the amount of transmission capacity which the Colstrip owners reserved in the Montana Intertie. It would be a rare circumstance to set aside the Montana beneficial use tax under these circumstances. *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934).

The Montana Legislature has the authority to select the use of 500 kv transmission line systems as the object of beneficial use taxation. *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973). The tax was enacted to ensure that users of 500 kv systems would not escape taxation. That reasonable and rational purpose is sufficient to ground the tax constitutionally. *Allied Stores of Ohio v. Bowers*, supra.

The Colstrip owners' equal protection argument is but another manifestation of their Commerce Clause discrimination argument. Under Montana law, the Colstrip owners had

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[50] BPA represented in its Environmental Impact Statement "The Garrison-Spokane 500-kV Transmission Project is a proposal to build 500,000-volt transmission line facilities across western Montana and northern Idaho to the Spokane area in order to reinforce a section of the Bonneville Power Administration's electric power grid and to permit reliable integration of 1,240 megawatts of power produced by Colstrip Units 3 and 4, for use in Montana and throughout the Northwest." (Def. Ex. 36, Vol. I, Pg. i).

an affirmative duty to prove that other entities were similarly situated, vis-a-vis the Montana Intertie.[51] The Colstrip owners abjectly failed to prove that there were any entities which are similarly situated with respect to the Montana Intertie. Montana cooperatives are BPA customers and purchasers of federal power. *Pacific*, at 773 P.2d 1187. The Colstrip owners are bulk power transferrers of massive amounts of Colstrip power across the Montana Intertie. Their equal protection claim fails upon this basis alone.

The Colstrip owners misrepresent the record. The Department established at trial that all entities, subject to taxation under Mont. Code Ann. § 15-24-1203 (1983), had been subjected to appropriate investigation.[52] The Colstrip owners are the exclusive users of the Montana Intertie, for purposes of 1984 beneficial use taxation. No other private entities enjoyed reserved transmission capacity in the lines. Until January 23, 1986, the Colstrip owners enjoyed the exclusive right to use 1,915 megawatts of east to west transmission capacity in the Montana Intertie.

According to Mont. Code Ann. § 15-24-1203 (1983), possession *or beneficial use* of 500 kv systems is an acceptable predicate for taxation. These equally justifiable bases for taxation were affirmed by this Court in *County of Fresno*, supra.

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[51] Mont. Code Ann. § 26-1-402 (1983) imposes a duty upon a plaintiff to establish its case by a preponderance of the evidence. (Resp. App. 7). Mont. Code Ann. § 26-1-401 (1983) establishes the burden of going forward with the evidence, in order to establish the case. (Resp. App. 6).

[52] Mr. Holliday testified that lessees of Forest Service land had exclusive use of the land, for which they were taxed. (Holliday Tr. Pgs. 829 and 839).

CONCLUSION

The writ of certiorari sought by the Colstrip owners should be denied.

Respectfully Submitted,

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